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IN THE
Supreme Court of the United States

October Term, 1993

Fredrick H. Goldbecker, Harry F. Gillman,
Saundra K. Gillman, and John Doe and Jane Doe

Petitioners

v.

Fairfax County Economic Development Authority
and the Board of Supervisors of Fairfax County, Virginia

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

When a public body brings an adversarial action against all taxpayers, property owners, and citizens in a political subdivision, including all non-residents owning property in or subject to taxation in said political subdivision, or otherwise affected by the action brought by the public body, and the names and addresses of all named defendants are known to the public body, and defendants regularly receive upwards of four mailings a year from the public body, are constitutional requirements for notice to defendants of the proceeding satisfied when the only notice given defendants by the public body is by publication in a relatively obscure newspaper with a circulation readership of no more than 6% of the named defendant class?

PARTIES

The appellants in the Supreme Court of Virginia were Fredrick H. Goldbecker, Harry F. Gillman, Saundra K. Gillman, and John Doe and Jane Doe. The appellees in the Supreme Court of Virginia were the Fairfax County Economic Development Authority and the Board of Supervisors of Fairfax County, Virginia.

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Va. Code 15.1, Art. 6, Ch. 5.1; Code §15.1-227.54 1, 2, 8

Other:

16 AmJur 2d, Constitutional Law, §191 4

DECISION BELOW AND JURISDICTION OF THIS COURT

The decision of the Supreme Court of Virginia to which Writ of Certiorari is petitioned is the September 14, 1993 denial of petitioners' petition for Writ of Error by that court, said order appearing as Appendix A to this petition.

The jurisdiction of this Court is invoked pursuant to Rule 13.4 of this Court because the decision sought to be reviewed involves a final judgment by a State supreme court which this Court has jurisdiction to review under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The first section of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, §1

STATEMENT OF THE CASE

On February 23, 1993, the Fairfax County Economic Development Authority (EDA) brought an action at law, as provided by Article 6 of Chapter 5.1 of Title 15.1 of the Code

of Virginia (Public Finance Act) to validate the issuance of certain bonds and all underlying procedures relating thereto. As provided by the cited law, the named defendants to this action were "all taxpayers, property owners, and citizens of Fairfax County, Virginia, including nonresidents owning property or subject to taxation therein, and all other persons affected by or interested in the issuance of said bonds."

The object of the action was to validate some $110 million of bonds to enable the County to purchase, without a referendum, two office buildings, known as buildings B-2 and B-3, and an adjacent undeveloped five acre parcel known as B-1, for some $115 million, although the total 1993 assessment for these properties was less than half that amount, $50,134,065. The buildings are currently being rented by the County at exorbitant rental rates as part of a series of continuing and interlinked transactions with a certain developer dating back to 1987. To achieve this purpose, a plan had been devised whereby the EDA would agree to sell the requisite bonds and give the proceeds to the County as "advance rent" by EDA, whereupon the County would buy the properties from the developer, rent to EDA, but immediately sublease the properties from EDA with the rent to be paid by the county on the sublease being the pass-through debt service on the bonds sold by EDA.

As provided by Code §15.1-227.54 of the Public Finance Act pursuant to which EDA brought its action, an order *ex parte* was entered on the day of filing of the action by the Honorable Richard J. Jamborsky, Chief Judge of the Fairfax County Circuit Court, setting April 8, 1993 as the hearing date, and ordering that the motion for judgment be published for two consecutive weeks in a local newspaper called "The Fairfax Journal", directing that the second publication be no less than at least 10 days before the scheduled hearing, and requiring that any defendant named in the motion for judgment had to file any answer, brief, memorandum of law, or other legal papers within 10 days of the second publication. The following day, the Board of Supervisors of Fairfax County (County),

obtained an order entered *ex parte*, to enter the case as "plaintiff/intervenor".

Fairfax County resident and property owner attorney Fredrick H. Goldbecker (Goldbecker) timely filed an answer and affirmative grounds of defense *pro se*, and as attorney for other named parties, wherein he sought declaratory relief and raised the issue of the unconstitutionality of the notice by publication.

On or about April 2, 1993, after expiration of the response period stated in the *ex parte* order, Harry F. Gillman and Saundra K. Gillman (Gillmans), residents of the state of Tennessee owning property in Fairfax County Virginia and subject to taxation, thus part of the named defendant class, by counsel Goldbecker, filed a motion to quash service on grounds of lack of constitutional notice, basing their argument on the decisions of this Court and of the United States Court of Appeals for the Fourth Circuit, and the facts that they were not subscribers to the newspaper in which the notice of the action was published, that they had neither actual nor constructive notice of the proceedings, and that the extremely limited circulation of the newspaper in which the notice was published precluded reasonable notice as required by the aforesaid decisions. These defendants were joined by John Doe and Jane Doe, who symbolically represented other interested non-residents made part of the defendant class to whom reasonable notice was denied, and subsequently joined by Goldbecker individually and by the persons on behalf of whom he had earlier filed answer and grounds of defense to the action brought by respondent EDA.

The defendants Gillman and Doe were not subscribers to the newspaper in which the notice of the bond validation action was published, nor was the newspaper readily available to them, and they were unable to file responses by time stipulated in the *ex parte* order. As a result, although they remained in the class of named defendants and their property rights as taxpayers and citizens would be affected by the outcome of the litigation, the notice given unconstitutionally deprived them of

their absolute right to be heard in the proceeding. The defendant Goldbecker, although by special effort he became aware of the action brought and had filed a timely response, has standing, as do those defendants on whose behalf he filed a timely response at the same time, to challenge the constitutionality of the notice given because fundamental constitutional rights are involved and they could be prejudiced by a future exercise of this form of notice, and because they has a close relationship to the rights of third parties, i.e., fellow citizens and taxpayers, who because of the constitutionally defective notice given are unable to assert their own rights. See, generally, 16 AmJur2d, Constitutional Law, §191, pp. 597-598 (1979).

On April 2, 1993, the announced trial date of April 8, 1993 was continued in order to allow time for preliminary motions and discovery. A hearing on the motion to quash service on constitutional grounds was held April 12, 1993, the Honorable Thomas J. Middleton of the Fairfax County Circuit Court presiding. At this hearing neither EDA nor the County disputed that the newspaper known as "The Fairfax Journal" had maximum daily circulation of 28,000, which was approximately 3 1/2% of the county's population of over 810,000 and only 6% of the 439,581 registered voters in the county as of April 6, 1993. Also, neither EDA nor the County disputed that no attempt had been made by EDA or the County to mail actual written notice to any named defendant; and neither disputed that the County regularly mailed all property owners a notice of assessment and two real property tax bills each year, and personal property tax bills to almost every citizen at least once a year. The trial judge ruled, however, that the "Fairfax Journal" met the legal definition of "a newspaper published or having general circulation in the jurisdiction", and that mailing of notice was not required. The order was properly objected to.

Trial of the case was held beginning June 14, 1993 and concluded late in the day of June 16, 1993 at which time the

trial judge validated the proposed bonds and underlying proceedings and transactions.

The final order was entered on June 21, 1993, and Notice of Appeal to the Supreme Court of Virginia was filed with the Fairfax County Circuit Court on June 24, 1993. All briefs were timely filed with the Supreme Court of Virginia, with the lack of constitutional notice of the proceeding in the trial court being the First Assignment of Error. Oral argument on the petition for Writ of Error was heard by a panel of the Supreme Court of Virginia on September 2, 1993, and appellee's petition was denied on September 14, 1993.

WHY THE WRIT SHOULD BE ALLOWED

The action by the trial court in overruling petitioners' motion to quash on grounds of lack of constitutional service of notice of the pending action, and the refusal of the Supreme Court of Virginia to find error in the trial court's action is in direct conflict with decisions of this Court and of the United States Court of Appeals for the Fourth Circuit to the extent that the names and addresses of the defendant class were all known by plaintiff EDA who was at all times acting in concert with, and as surrogate for, the plaintiff/intervenor County, and due to the fact that the newspaper in which notice of the proceeding was published reaches no more than 6% of the defendant class and cannot be deemed to be reasonably calculated to inform the defendant class of the action brought.

Petitioners respectfully submit that this Court should review, re-examine, and set standards addressing the general efficacy of notice by publication in an age and time in which most of the public receives its information through the electronic media. Petitioners do not seek general abolition of service of notice by newspaper publication, but submit that when a public body contemplates an action in which significant portions of the public are named as parties defendant in an adversarial action, that in addition to mailing to the known addresses of

such defendants when such mailing would be at minimal expense as here, the published notice cannot be hidden in a relatively obscure publication with minuscule readership, as was the case here and as is often done in many instances across this nation, but must meet a higher readership and notice standard whether through one publication or a combination thereof. Unless this Court establishes objective and reasonable standards, its many decisions, *infra.*, will be but hollow and precatory statements, and the door to deception and fraud of the citizens by their government will be left not merely ajar, but wide open.

The decisions of this Court and of United States Court of Appeals for the Fourth Circuit over the last 43 years leave no question that publication of notice, without mailing of notice when a plaintiff knows the names and addresses of any defendant, or such names and addresses are easily available, is constitutionally unacceptable. And even when publication of notice is the only reasonably available vehicle, such publication must be reasonably calculated to reach the affected persons.

In the matter of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court held that notice of a pending action must be:

> . . . reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> *Mullane,* 339 U.S. 306,314

If names and addresses of parties affected by a proceeding are known, there is ". . . no tenable ground for dispensing with a serious effort to inform them personally . . . at least by mail to the record addresses". *Mullane,* 339 U.S.306, 318.

To meet constitutional due process requirements, notice of a pending action must be "reasonably certain to reach most of

those interested in objecting". *Mullane,* 339 U.S. 306, 319. Mere publication alone is not sufficient when the names and addresses of parties against whom an action is brought because ". . . it is not reasonably calculated to reach those who could easily be informed by other means at hand". *Mullane, Id.* This principle has been consistently applied by this Court. See: *Walker v. City of Hutchinson,* 352 U.S. 112 (1956); *Shroeder v. New York City,* 371 U.S. 208 (1962); *Robinson v. Hanrahan,* 409 U.S. 40 (1972).

More recently, in *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983), this Court unequivocally held that:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. (emphasis in original)
>
> *Mennonite Bd. of Missions,* 462 U.S. 791, 800

In 1991 the United States Court of Appeals for the Fourth Circuit, following this principle, held that ". . . service by publication is constitutionally insufficient where actual notice by mail is feasible." *U.S. v. Borromeo,* 945 F.2d 750, 752, (1991).

The class of defendants named in this action regularly receive mass mailings from the Fairfax County, including, but not limited to, mailing of personal property tax forms, personal property tax bills, real property assessment notices, followed by real property tax bills (twice a year).

The EDA, which brought this action admitted in an exhibit to its Motion for Judgment that it was functioning on behalf of the County and acting as its public instrumentality; thus the

names and addresses of defendants were easily and readily available from the County's tax records.

Apart from the above, the newspaper chosen to publish the notice in does not meet the necessarily implied constitutional requirements of Code §15.1-227.54 that such newspaper be published in or have a general circulation in the jurisdiction in which the bond issuer is located. Obviously, just as the publication of only one copy of a newspaper would not suffice, the term "general circulation", to comply with the decisions of this Court and of the United States Court of Appeals for the Fourth Circuit cited *supra.*, must necessarily be read to require publication in a newspaper which has circulation readership substantially more than just 6% of the named defendants as was done in the case at bar.

The circulation of The Fairfax Journal is 28,000. The population of Fairfax County is over 810,000, and as of April 6, 1993, the number of qualified voters in Fairfax County was stated by the Registrar's office as 439,581. The circulation of this newspaper is thus only six percent of the qualified voters who, of course, are only part of the class of defendants named in the action brought by EDA.

Finally, while Code §15.1-227.54 of Virginia's Public Finance Act is silent on the mailing of actual notice to known persons and addresses, to not necessarily imply such requirement would render Code §15.1-227.54 unconstitutional, a result which should be avoided. Thus Code §15.1-227.54 to be construed as constitutional must necessarily be understood to include the mailing requirement to the last known addresses of any named defendants.

CONCLUSION

The notice given by respondents to the named defendants in the action brought by the former in the Circuit Court of Fairfax County was shockingly insufficient as a matter of the law as decided by this Court and the United States Court of

Appeals for the Fourth Circuit. Notice to all defendants could have been easily and inexpensively provided by inclusion of a brief notice of the proceeding in one of the many regular mailings made each year to defendants. But, *arguendo,* if mailing of notice to the named defendants were deemed unfeasible, the vehicle selected for publishing the notice, a relatively obscure newspaper with a maximum potential readership of no more than 6% of the named defendant class is woefully inadequate and tantamount to no notice at all.

Technology and contemporary information distribution has largely eviscerated the concept of adequate notice being provided in small type in the classified adds in little-read newspapers, and the use of such method in an instance such as that described in the case at bar amounts essentially to fraud on the public. Petitioners respectfully submit that the question they pose to this Court affects not only them, but all citizens in all States; thus it is incumbent upon this Court to address and correct this ever more pressing and increasingly practiced denial of a fundamental citizen's right by means of an empty charade of service of notice by publication as was done in the case at bar, and which mocks the substance of the basic notice requirements so often and uniformly proclaimed by this Court.

Accordingly, for all the foregoing reasons, this Court should grant this petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX

September 14, 1993 Denial of Petition for Writ of Error by Supreme Court of Virginia

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 14th *day of* September, 1993.

Fredrick H. Goldbecker, et al., Appellants

against Record No. 930924
Circuit Court No. LA-121909

Fairfax County Economic Development Authority, et al., Appellees

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
David B. Beach, Clerk
By:
/s/
Deputy Clerk